



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

December 19, 2002

Mr. Bryan P. Fowler
Attorney for the City of Montgomery
The Fowler Law Firm
300 West Davis, Suite 510
Conroe, Texas 77301

OR2002-7297

Dear Mr. Fowler:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 173919.

The City of Montgomery (the "city"), which you represent, received a request for "[p]hotocopies of all applications, resumes and/or letters received by the City of Montgomery with regard to the selection and subsequent appointment of the Chief of Police for the City." You state that you have released some of the information. You claim that the remainder of the requested information is excepted from disclosure under sections 552.117, 552.130, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we must address the city's obligations under section 552.301(e) of the Government Code. Pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. You did not, however, submit to this office a copy of the written request for information within the fifteen business-day deadline.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). As sections 552.117, 552.130, and 552.137 of the Government Code provide compelling reasons to overcome the presumption of openness, we will address your arguments under those exceptions. *See* Open Records Decision No. 150 (1977) (presumption of openness overcome by a showing that the information is made confidential by another source of law or affects third party interests).

Section 552.117(2) of the Government Code excepts from disclosure "information that relates to the home address, home telephone number, or social security number" of a peace officer as defined by article 2.12 of the Texas Code of Criminal Procedure, or that reveals whether the peace officer has family members. We first advise that section 552.117(2) applies only to peace officers fitting the definition in article 2.12 of the Code of Criminal Procedure. You do not indicate, nor does it appear, that the out-of-state peace officers qualify as peace officers under this definition. The city must withhold the portions of the records that reveal article 2.12 peace officers' home addresses, home telephone numbers, and social security numbers, which you have marked.

You have marked information pertaining to three out-of-state officers. We have explained why this information is not protected by section 552.117(2). However, you ask us to consider this information under section 552.117(1). Section 552.117(1), read together with section 552.024, provides for the confidentiality of home addresses, home telephone numbers, social security numbers, and family member information of current and former city employees when the city employee has made a timely election. *See* Open Records Decision No. 674 at 4 (2001) (stating that, "a governmental body is normally obliged under section 552.117 to protect only information pertaining to employees and officials of that governmental body"). You have not argued that any of the out-of-state applicants are current or former city employees. *See* Open Records Decision 455 at 2 (1987) (construing section 552.117's predecessor statute to not extend to applicants for government employment). Therefore, you may not withhold this information under section 552.117(1).

One out-of-state applicant's social security number appears in the submitted information. The social security number may be excepted from disclosure under section 552.101 of the Government Code in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for

concluding that the social security number in the submitted information is confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Public Information Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the city pursuant to any provision of law enacted on or after October 1, 1990.

We now turn to your argument under section 552.130 of the Government Code. Section 552.130 provides in relevant part:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]

(2) a motor vehicle title or registration issued by an agency of this state[.]

You have marked one driver's license number in the submitted documents. If the license was issued by the State of Texas, you must withhold the driver's license number under section 552.130.

Additionally, the submitted information contains e-mail addresses obtained from the public. Section 552.137 makes certain e-mail addresses confidential.¹ Section 552.137 provides:

(a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Gov't Code §552.137. You do not inform us that a member of the public has affirmatively consented to the release of any e-mail address contained in the submitted materials. The city must, therefore, withhold all e-mail addresses of members of the public under section 552.137.

¹House Bill 2589 also makes certain e-mail addresses confidential. See Act of May 22, 2001, 77th Leg., R.S., H.B. 2589, § 5 (codified at Gov't Code § 552.136). The language of section 552.136, as added by House Bill 2589, is identical to that of section 552.137.

In summary, the home addresses, home phone numbers, social security numbers, and family member information of licensed peace officers, as defined in article 2.12 of the Code of Criminal Procedure, are confidential under section 552.117(2) of the Government Code. This same information may not be withheld under section 552.117(1) or 552.117(2) for the out-of-state officers. However, the out-of-state applicant's social security number may be confidential under 432 U.S.C. § 405(c)(2)(C)(viii)(I). Additionally, you must withhold any Texas driver's license numbers under section 552.130. You must withhold the email addresses under section 552.137.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be

sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script, reading "Jennifer E. Berry".

Jennifer E. Berry
Assistant Attorney General
Open Records Division

JEB/sdk

Ref: ID# 173919

Enc: Submitted documents

c: Conroe Courier
c/o Bryan P. Fowler
The Fowler Law Firm
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Conroe, Texas 77301
(w/o enclosures)